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In the Supreme Court of the United States

OCTOBER TERM, 1968

UTILITY USERS LEAGUE and NICHOLAS L. BARNES,
Petitioners,

vs.

FEDERAL POWER COMMISSION,
Respondent,

COMMONWEALTH EDISON COMPANY,
Intervenor-Respondent.

On Petition to Review orders of the Federal Power Commission

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NOW COMES UTILITY USERS LEAGUE, *et al.*, Petitioners herein, respectfully prays that a writ of certiorari issue to review the final judgment of the Court of Appeals for the Seventh Circuit in this Cause.

OPINIONS BELOW

The decision of the Court of Appeals has been reported in 394 F. 2d 16. The FPC order entered on December 2, 1966 is at 36 FPC 927.

JURISDICTION

The judgment was issued on April 5, 1968. On May 21, 1968 it denied Petitioners' Petition for rehearing and on May 28, 1968 a similar Order was filed by the Court en banc. An extension was granted Petitioners by Justice Thurgood Marshall until September 10, 1968 to file this Petition. Such jurisdiction is founded upon 16 U.S.C. 825 1(b) and 28 U.S.C. 1254(1).

STATEMENT OF GROUNDS UPON WHICH THIS COURT'S JURISDICTION IS INVOKED

The jurisdiction of this Court is invoked upon the following primary grounds:

1. The ruling of the Court denying Petitioners' standing to review the FPC Merger order is contrary to decisions of this Court and other Courts of Appeal.

2. Though the basic issue involves the FPC's duty to preserve sound, efficient small operating companies providing electric service to the mass of residential customers at lower rates than giant systems such as Commonwealth Edison Company (Edison), it also presents the interpretation of the merger provisions of the Federal Power Act (FP Act) 16 U.S.C. 824 b Sec. 203, in relationship to the overall object of such statute, the Public Utility Holding Company Act (HC Act) and the anti-trust laws and policies.

3. Since the FPC approved the merger primarily because of power supply factors and assumed "economies of scale" in relation thereto, this Court should decide whether FPC has unlimited discretion to disregard the fundamental voluntary intereonnection, coordination and

power supply purposes of the FP Act, in favor of compulsory merger, even though Central Illinois and Electric Gas Company (Central) had available substantially the same supplementary supplies of electric power from Edison at its average generating costs. (FPO p. 13) (36 FPC 936).[1]

4. Apparently no other Courts since the passage of the FP Act has decided this basic issue, though between 1951-1965, FPC approved 108 Class A electric company mergers (FPO p. 3).. The number of such companies in the country diminished to only 215 as of December 31, 1965.[2] The FPC has only recently revealed a concern over the increasing trend of acquisition of smaller municipal and privately-owned plants.

5. This Court for the first time can determine the special relationship between anti-trust laws and policies to mergers under the FPA. It has consistently fulfilled such vital function with respect to other regulated industries.

6. The settlement of this important federal question is also necessary in view of the rulings of the Court and FPC. The Court affirmed the FPC merger order on the theory, in part, that restraints on competition in the electric industry were encouraged even though it could not say the merger "has no adverse effect on competition" and asserted "We merely hold that petitioners have not shown an anti-competitive injury affecting them." (394 F. 2nd 20). (Protection from competitor and this merger are not the same)

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[1] The FPO page numbers refer to the original FPC merger order of December 2, 1966. The 36 references are to the GPO Preliminary Print 36 FPC (927-946).

[2] Statistics of El. Utilities in the U.S. 1965, Classes A and B Privately Owned, FPC p. V Preface. Class A have annual revenues of over $2,500,000, Class B $1,000,000 to $2,500,000.

7. FPC's application of the anti-competitive issue was erroneous for several reasons including the fact that it considered relevant only whether the merger would "bring a significant added concentration of economic power." (FPO 23) (36 FPC 941). *This theory would eliminate restraints on mergers.*

8. The nature of the burden of proof to be applied is a judicial question, particularly whether a presumption against a merger may not be assumed against so large a company as Edison. This is aside from the injury to the public recognized by the Court that Petitioners had shown the merger "may result in higher rates for Central's electric customers." (394 F. 2nd 20).

9. Since the FP Act is silent as to FPC's responsibility under anti-trust laws and contains no provision exempting electric utilities from such laws, Congress intended this Court should review and reach an independent judgment upon FPC's application of anti-competitive factors.

10. It presents substantial issues affecting the objects of the FP Act and HC Act in relation to the alleged overcapitalization, excessive price paid for Central and substitution of a non-integrated electric and gas company for an integrated electric company (Edison) prior to the merger.

11. The FPC interpreted the key proviso in 16 USC 824 b that a " 'showing that positive benefit to the public will result' " is not required under *Pacific Power and Lt. Co.* v. *FPC,* 111 F. 2d 1014, 1017 (CA 9, 1940) (FPO p. 4, 36 FPC 931), without giving effect to its ruling mergers should not result "in detriment to consumers or investors or other legitimate national interests." (p. 1016)

12. The Court's denial of Petitioners' Motion to Remand is contrary to well recognized principles for the FPC failed in its duty of making an independent study of and developing an adequate record upon several controlling factors including (a) the need for preserving small companies, (b) the so-called "economies of scale" as related to Edison and Central's overall costs, (c) anti-trust issues, (d) whether Edison has discriminated against its 2,000,000 residential users and granted preferential treatment to its less than 600 large industrial customers so that it may compete unfairly for such business with other electric companies and pursue the same practice in favor of a few customers using electricity for house heating as well as apartments and office buildings; (e) the effect upon air pollution in the City of Chicago of relieving Central of building its own generating facilities. (Motion p. 4-16 and Exhibits).

13. It also presents basic issues of the interrelationship between state and federal authorities requiring resolution by this Court.

STATUTES INVOLVED

The Statutes involved are the Federal Power Act as a whole Sub-Chapter II, Regulation of Electric Utility Companies Engaged in Interstate Commerce, 16 U.S.C. 824-825u and more particularly Secs. 203, 202, 206, 16 U.S.C. 824, 824a, 824b, 824 1. It also involves 15 USC 79 ff Public Utility Holding Company Act of 1935 and Secs. 7 of the Clayton Act. 15 U.S.C. Sec. 18; 15 USC Sec. 2.

QUESTIONS PRESENTED

1. Did Petitioners have standing under 16 U.S.C. 8241 as an aggrieved party to seek review of the FPC orders and may they assert any alleged errors affecting the public interest.

2. Does Sec. 16 U.S.C. 824, Sec. 203a permit approval of a merger as consistent with the public interest even in the absence of positive benefit and how should this standard be applied.

3. Does the order of December 2, 1966, contravene Sec. 203a and the Federal Power Act as a whole for the reason among others that the purchase price was excessive.

4. Did Edison and Central fail to sustain the burden of proof imposed upon them.

5. Does the Order violate the Public Utility Holding Company Act Section 11 (b) (1) in that it converts Edison from an integrated electric company into a utility operating non-integrated gas and electric properties.

6. Are the FPC Orders of December 2, 1966 and January 30, 1967 arbitrary and illegal in that they violate anti-trust laws and policies.

7. Did the FPC fail in its duty to develop an adequate record upon the controlling issues.

8. Did it err in failing to reopen the case as requested by Petitioner.

9. Did the Court of Appeals err in failing to grant the League's Motion to Remand.

10. Did the Court of Appeals err in affirming the FPC Orders.

11. Was the order contrary to the evidence.

STATEMENT OF THE CASE

The record contains the FPC Order, the Opinion of the Court of Appeals and Petitioner's Motion to Remand denied by the Court of Appeals. (394 F.2d 16, 21). These documents, with the additional facts referred to in this Petition, provide an adequate basis material to the consideration of the questions presented. It would unduly lengthen this Petition to duplicate such factual material. Though we accept the FPC's statements of fact, we generally disagree with their conclusions. Moreover, as this Petition indicates, FPC overlooked a number of critical facts.

The purpose of the Motion to Remand is to show the material facts omitted from the record and to provide substantial support for our claim it is the smaller companies like Central rather than the giant systems like Edison which provide in general the lowest residential rates in the country. It also serves to back up our contention the FPC staff concentrated entirely too much on power supply problems and should have devoted more attention to the comparative efficiency and costs of service incurred by smaller as compared with larger electric companies.

Though FPC possesses one of the most competent research staffs of all regulatory agencies and constantly publishes valuable economic, rate and statistical studies, little if any is in this record.

Edison and Central presented their application under Sec. 203(a). Edison's interstate operations are substantial and Central conceded jurisdiction. None of the problems presented in *Duke Power Co.* v. *FPC*, No. 20,578, CAD of C June 28, 1968, are considered applicable here. This

searching extensive opinion, demonstrates the need for close scrutiny on the merits of the present merger. The points below illustrate shortcomings in the Record.

1. The FPC Order granting petitioner's intervention was entered on July 3, 1968. The interval was too short to prepare for the hearings scheduled for July 11 and closed on July 20 even though much of Edison's affirmative case was made available to Petitioner earlier. Since Central and its predecessors were first organized in 1855, we think a 30 day postponement for rebuttal and the scheduling of the hearing in Chicago were essential ingredients of a fair hearing.

2. Some facts about Edison and Central have obviously been overlooked in the FPC Order. Though it serves an area of 11,000 square miles, or about 20% of Illinois, the heart of the Chicago Metropolitan area, including large suburbs, and the northern part of the state, its revenues represent over 60% of all Illinois electric revenues.

3. Central's total territory was about 3,200 square miles and served about 95,000 electric customers. Edison had ver 2,200,000 customers in its 11,000 square miles. Central's density of customers per square mile was about 30 compared to Edison's 200. Yet the FPC attempted to explain Central "favorable profit picture and rates comparable to Edison" (p. 20) (36 FPC 939) because Central had a higher density in Rockford. Central had much lower residential rates than Edison's.

4. The order considers as a favorable factor toward Edison its total rate reductions of $31,000,000 since 1962 and that Central has not reduced its rates "at the same pace" as Edison (FPO 20, 36 FPC 939). However the order

ignored Edison's admission its rate reductions had not offset the much larger rate increases made by Edison during the last 10 year period. Nor was any calculation made as to the savings to Edison's customers if the $.75 monthly rate charged by Central to most of its residential customers was substituted for Edison's minimum monthly charge of $1.00 in Chicago and $1.50 in its suburban territory. No explanation was given for FPC's failure to put into the record the numerous national and Illinois rate studies made by its staff. Petitioner's Motion to Remand exhibits A, B, and C disclosed, unfavorable position compared to Central and over 30 of the 40 electric companies in the country whose annual revenues exceeded $100,000,000 in 1965.

Moreover at best, FPC's conclusion concedes Central could have achieved the so-called "savings of scale" had it not "essentially isolated" itself (FPO p. 29) (36 FPC 944). A company which could serve 80% of its residential customers at rates lower than Edison, increase its business at a little higher rate and still make a somewhat higher rate of profit than Edison (1965 Statistics Electric Utilities FPC pp. 652, 653) is hardly the proper subject of compulsory consolidation.

Surely, these and other similar facts in the Motion to Remand rebut Edison's and FPC's reliance upon "economies of scale" as a controling factor.

ARGUMENT SUPPORTING REASONS RELIED ON FOR THE ALLOWANCE OF PETITION

I. PETITIONERS WERE AGGRIEVED PARTIES AS CONSUMERS AND AS REPRESENTATIVES OF THE PUBLIC INTEREST.

The Court, Judge Swygert dissenting, sustained Edison's contention Petitioners lacked standing as an "aggrieved" party under 16 U.S.C. 825 1 (b) for it held they failed to "make the threshold showing of aggrievement" (pg. 7) (394 F. 2nd 21) FPC did not join in this claim. The Court's errors are recognized in the minority opinion. Judge Swygert properly relied upon Petitioners exercise of their right to file a petition for rehearing (FPC rec. 1943-1956) (without Edison's objection)[3] founded upon 16 U.S.C. 8251 (a) limiting such privilege to "any person . . . aggrieved by an order of the commission." The identical phrase governes judicial review of FPC's order under 16 U.S.C. 8251 (b).

This point was considered and decided contrary to Edison's claim in *Scenic Hudson* v. *FPC*, 354 F. 2nd, 608, 616 (CA 2, 1966). The majority also overlooked *Abbott Lab.* v. *Gardner*, 387 U.S. 135, 140, 141 reaffirming the principle against restrictions of judicial review which are not to "be cut off unless there is a persuasive reason to believe that such was the purpose of Congress."

The Court would destroy effective intervention by consumers before administrative agencies and nullify their capacity to act as a private Attorney General approved

[3] Edison filed no Motion to Dismiss Petitioners' Petition for Review.

in a growing number of cases since *Asso. Indus.* v. *Ickes*, 134 F. 2d 694, 704 (2d Cir.), *United Church et al.* v. *FCC et al.*, 359 F. 2d 994, 998-1006 (1966—CA D of C), see also *FCC* v. *Sanders Radio Station*, 309 U.S. 470, and *Flast* v. *Cohen*, 20 Law Ed. 2d 947 and dissent of Justice Harlan at 973 and *Booth* v. *General Dynamics Corp.*, 264 F. Supp. 465 Dt. Ct. No. Dt. Ill. (1967) for expanded recognition of tax payers, consumers and others.

The major thrust of Petitioner's FPC Petition for Intervention (Rec. 1551-1562) was devoted to a demonstration intervention was necessary to protect the public interest as the merger was contrary to the broad purposes of the FP Act, HC Act and Anti-trust Statutes.

Though we do not stand in the same shoes as Kentucky Utilities in *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 7 we do, as there, come within the class the FP Act is "designed to protect" under *Pennsylvania Water & Power Co. et al.* v. *FPC*, 343 U.S. 414, 418 for this Court then said "a major purpose of the whole Act is to protect consumers against excessive prices."

It would be repetitious to take up each of the Court's erroneous conclusions at this time for they will insofar as possible be met in the balance of the Argument.

II. THE MERGER WAS CONTRARY TO THE FEDERAL POWER ACT AND RELATED STATUTES AND PRESENTS VITAL UNSOLVED FEDERAL QUESTIONS AS TO JUSTIFY GRANTING OF THE PETITION.

A. General Statement.

Petitioners cannot, within a brief Petition, cover each of the errors committed by the FPC but will discuss only

those of greatest consequence.[4] The merger as a whole in relation to the relevant federal laws, can be judged by the demand (contrary to *SEC* v. *New Eng. System,* 384 U.S. 178) Edison be transformed from an integrated electric company to one operating scattered electric and gas properties throughout Illinois. Other basic aspects of the merger were equally in conflict with federal regulatory statutes and policies. The reservation of FPC authority to require Edison to subsequently dispose of such properties did not eliminate the basic conflicts between the merger and federal laws. This reservation does not conform to *Denver and Rio Grande RR, et al.* v. *U. S.,* 387 U.S. 485 and *U. S.* v. *Chicago M. St. P. & P. RR,* 294 U.S. 499, 510, when this Court said: "We have stressed the unsatisfactory consequences which often occur when agencies defer action and leave parties uncertain as to their rights and obligations."

The FPC and Court rulings may be tested by considering the following statement by FPC Chairman White before the Committee on Commerce in June 1967 when he said: (Hearings before the Committee on Commerce U.S. Ninetieth Congress 1. 1365, p. 28.)

> "The three principal areas in which Congress believed *Federal jurisdiction was essential to assure effective regulation of electric utilities were*: first, wholesale sales in interstate commerce; second, the financial operations and books of account; and third, interconnection and coordination of public utilities. Congress directed the Commission to encourage voluntary interconnection and coordination, supplemented by compulsory authority, to enable the Commission, upon application, to order jurisdictional public utilities to interconnect their facilities with other electric utilities and sell or exchange energy with them." (p. 28)

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[4] The FPC order reprinted in 36 FPC 927-946 lists 23 points in the syllabus. We disagree with the conclusions or application of at least one-half of them.

Though this Court in *Pa. Water and Power Co.* v. *FPC*, 343 US 414, 418 was dealing with FPC's control over interstate wholesale rates, FPC listed as relevant factors the impact of the merger upon consumers rates and effectiveness of state and federal regulation. This Court's statement in the above case is of equal significance in testing whether the merger conforms to the FP Act.

> "A major purpose of the whole Act is to protect consumers against excessive prices."

Edison conceded its retail rates do not measure up to FPC's rate making standards (Rec. 448). We will demonstrate the merger likewise is basically inconsistent with the Congressional purposes of the Federal utility laws.

B. The Purchase Price Was So Excessive As to Violate The Federal Power and Holding Company Statutes and Place an Undue Burden Upon Edison's and Central's Customers.

In his June 1967 statement to the Commerce Committee Chairman White listed "financial operations" as one of the three principal areas Congress believed Federal jurisdiction essential to assure effective regulation. Control over accounting was but one aspect of financial practices regulated to safeguard the public interest. Emphasizing the importance of the protection afforded the public by FPC activities in this field he said FPC had eliminated more than $1,600,000,000 of water from public utilities plant accounts. Unfortunately FPC failed to recognize Edison's financial proposals were merely a subterfuge to conceal the same practices under a different name.

The "reasonableness of the purchase price" (p. 7) was properly declared by the FPC to be one of the five basic

factors in determining whether "this particular merger is consistent with the public interest". Strangely the order devotes only a single paragaph to this vital issue (FPC p. 15, 16) (36 FPC 937) and also omits the purchase price.

It says Edison was paying "approximately $24 million more than the market value (of Central's stock) for the acquisition." (p. 15) Petitioners repeatedly challenged the excessive character of the price which can be calculated by applying the following principle:

> "To be sure, if the stock that is issued for the property has a definite market value at the time of the exchange, this value may be deemed to be the purchase price of the asset." Bonbright Valuation of Property, Vol. II, 1937, McGraw Hill. (p. 927)

As of the date of the merger contract the market value of Edison's securities was approximately $127,000,000. In addition it assumed approximately $50,000,000 of fixed liabilities. The total price was thus in the area of $175-$180,000,000.

The net investment of Central's property as of December 31, 1965, was $91,681,655 ($56,422,122 electric, $33,761,799 gas), (FPC 8) (36 FPC 933). Thus the ratio of net original cost to the price was 2 to 1. During the hearing the Examiner restated one of the Leagues questions to Central's President, John L. Gordon, as follows (Rec. 835):

> "Presiding Examiner: Take the price as of the day of the merger was announced, as of the day the company publicly committed itself to merger. Were you on that day getting for your shareholders 75 million dollars over and above the net assets being transferred?
>
> The Witness: I think so."

On June 10, 1968, the FPC in Columbus & So. Ohio Elec. No. 7390, though approving the sale of a small system, directed its staff to inquire into the relative efficiency of small and large electric plants. This is one of the critical issues upon which the FPC record was incomplete and was raised in Petitioner's Motion to Remand (p. 5-11). However, in his dissent, Commissioner Charles Ross related the price paid in several cases to the original cost of property acquired. These prices varied from $341 to $1093 per customer. However, though Central's net investment ($56,000,000) in electric plant per electric customer (95,000 in all) was $600 in 1965, Edison is apparently paying 60% of $175,000,000) nearly double that figure, or $1,100, for each Central electric customer. Edison's own investment in all its electric properties ($1,788,000,000) prior to the merger and including its enormous generating plants was but about $800 per customer (2,272,000 in all). Edison paid about $800 per Central gas customer compared to Central's net investment of about $400.

It is common knowledge that it was the application of fair value, reproduction cost and inflated appraisals which led to the bankruptcy of numerous utility holding company systems and passage of the HC Act in 1935. Section 79 (b) (1) 15 U.S.C. Necessity for Control of Holding Companies states:

> " . . . When such securities are issued upon the basis of fictitious and unsound asset values. . . "

The FPC Order is not in accordance with its own or the rigorous financial standards approved by the federal courts in utility cases. *FPC* v. *East Ohio Gas Co.*, 338 US 464, 475, *Calif. Ore. Power Co.* v. *FPC*, 150 F. 2d 25, 27 (CA 9th). See also *AT&T* v. *US*, 299 US 232, 246. Moreover, the FP Act has been liberally construed to assure maximum protection of the public interest by the FPC. *Jersey*

Central Power and Lt. Co. v. *FPC*, 319 US 61; *FPC* v. *So. Cal. Ed. Co.*, 376 US 205.

Both the FPC and the Court overlooked the burden imposed upon both Central's and Edison's customers by the price paid by Edison for Central's property. As far as the customers are concerned, the impact upon them by the excessive issue of Edison securities would be exactly the same as if Edison had increased its original cost by $75,000,000. It is the customers, and the customers alone, who support the entire capitalization of a utility and the rates must be high enough to pay operating expenses, interest dividends and as the record of Edison, Central and other utilities reveal, substantial annual additional sums for surplus. The Court was completely in error in assuming Edison's customers are protected from the adverse effect of the excessive price and over-capitalization because their rates are fixed on fair return on a fair value of Edison's property (394 F. 2d 20, 21). The reverse is true.

The issue whether Edison was permitted to evade the underlying purposes of the FP and HC Acts is a judicial question within the province of this Court.

C. This Court Should Decide The Relationship Between Anti-Trust Laws to the Federal Power Act.

Since this Court has consistently assumed the responsibility of passing upon the application of antitrust to other regulated businesses it is appropriate that it do so here involving as it does the largest. The fact that the FP Act is silent on anti-trust, and the FPC has since 1935, administered the statute does not mean that this Court should not now offer appropriate guidance to the FPC in the light of the rapidly changing technology and operating problems.

Moreover, this case involves the classic instance of a giant and a smaller neighbor, Central, which by no means was failing, inefficient or weak. On the contrary, it provided service to the bulk of its customers at lower rates than Edison and yet seemed to make a higher return on net investment. It presents the all-important problem of preserving smaller electric companies whose public need is considerably more than theoretical. In the absence of public competition and anything more than nominal rate control of Edison's $2,000,000,000 system, retention of smaller companies should assure at least the possibility of supplementary protection to the customer, depending in turn upon their independence and the capacity of states to regulate them.

This is particularly necessary where increases in size escalate ineffectiveness of control, especially since rates are fixed, if at all, only on the overall system as demanded by Edison. Moreover, its successful advocacy of fair value has probably dealt the final death blow to rate control. How can a former customer of Central (or even Rockford, Chicago or the State) establish that Edison as a system is producing more than a fair return on fair value. Local rate regulation of Edison thus becomes fiction.

This Petition is not the occasion for attempting to set forth the exact principles which should govern the relationship of the electric utility industry to the nation's anti-trust laws and policies. The FPC Order has undoubtedly made a contribution to the subject even though we quarrel with its conclusions. It was handicapped by the limited record bearing upon anti-competitive issues due, in part, to the fact that the original order listing the issues upon which testimony was to be taken contained no reference to anti-trust (Rec. 159). Moreover, it was persuaded by Edison that the hearing should be shortened and the examiner's report omitted. It did not require Edison to

sustain the burden of proof on this issue *U. S.* v. *First City Nat'l Bk.*, 18 Law. ed. 2d 151, 155, 156; *Pac. Power & Light* v. *FPC*, 111 F. 2d 1014, 1017.

The application of *Calif.* v. *FPC*, 369 U.S. 482 to electric utilities subject to FPC's jurisdiction under the FPC Act was upheld by Lee Loevinger, Ass't. Attorney General of the Antitrust Division of June 7, 1963 (pages 366-368), Part II National Power Survey in a letter to the head of the Committee's Legal Advisory Committee, Herbert B. Cohn. In this opinion he recognized the absence of a comprehensive federal statute regulating the rates, entry terms and conditions of service and other elements of the operations of these companies, This would imply support for Petitioners' claim the FPC Order and the Court's opinion in so far as they relied upon state regulation as the basis for exemption from anti-trust principles were in error, let alone that they overlooked they were banking on the fiction and not the reality of state control of so large a system as Edison.[1]

In declaring that it was concerned only with the added concentration of power arising from Edison's acquistion of Central it ignored the trend of concentration in the electric power industry even though this Court asserted in *Brown Shoe Co.* v. *U. S.*, 370 U.S. 294, "the rising tide of economic concentration" (p. 317) and "another important factor is the trend toward concentration in the industry." (p. 332). The principles underlying the *Brown Shoe* case were applied by the Court to utilities regulated by the FPC in *U. S.* v. *El Paso Nat. Gas Co.*, 376 U.S. 651, 658, where the Court quoting from *Brown* declared "mergers with a probable anti-competitive effect were to be prescribed by this Act." (Sec. 7 of the Clayton Act).

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[1] See opinion of Commissioner Nicholas Johnson in *AT&T* case, FCC No. 16258, July 5, 1967.

Assume Edison (prior to the merger) controls 65% of the customers, electric plant and revenues in Illinois. Central's merger would bring this to about 70%. Assume also substantial portions of Illinois-Power Company service areas are contigous to Edison and not to the balance of Illinois Power. The contigous area would add only another 3% to Edison's 70% of plant and revenues. This additional acquisition would also not be significant. Even if Illinois-Power or another electric company furnished 10% of the remaining service in Illinois, such 10% would be less of a significant added concentration to Edison's new 70% figure than to its original 65% prior to the merger with Central. The FPC doctrine would readily escalate mergers if literally applied.

It is a function of this Court to pass judgment upon such questionable principles.

The Petition should be allowed.

D. Other Important Factors Require The Granting Of This Petition.

It is impossible to determine the full extent to which the Commission's judgment was colored by its conclusion no showing of positive benefit was required under the provisions of the merger need only be "consistent with the public interest." There is no doubt but that its approval was seriously affected by this principle.

What is consistent with the public interest depends upon the characteristics of the purchaser and the seller, the special and peculiar current operating conditions as they bear upon the FPC overall responsibilities, the legislative history and Congressional intentions in enacting the federal statutes we have discussed. This is indeed what the FPC endeavored to do but, lacking the guide and direction of

the highest Court, it departed from its customary effective standards of public protection.

True, this Court has in its review of Section 5(2)(b) the Interstate Commerce Act, dealt with a similar statutory provision. *Gilbertville Trucking Co.* v. *U. S.*, 371 US 115, 127, 128; *Schwabacher* v. *U. S.*, 334 US 182, 193; *McLean Trucking Co.* v. *U. S.*, 321 US 67, 86-88.

We find no support in them for the view no public benefit is required. In fact, consistency or compatability with the public interest implies substantial public values or benefits.

Nor can the merger be sustained by Central's power requirements. There is no claim in the record of any existing shortage of electric power as far as Central or its customers are concerned. Its present contract with Edison for supplementary modest supplies of electric energy (p. 10) was not only in no danger of termination, but Edison had made "a bonafide offer" (p. 14) of additional supplies on a ten year basis. The Commission declared that the rate for this power seemed to reasonably reflect Edison's "present average generation and transmission costs." (p. 14) However, because it would not "secure the full benefits of the lower costs" associated with the more efficient generating plants now under construction or planned for the future (p. 14) it rejected this method. It completely overlooked the fact that Central's customers would not be entitled to, under the merger, rates based upon only Edison's lowest cost generating and transmission facilities but must be charged with average costs.

The FPC order is hinged primarily upon Edison's "economies of scale" for it said the "touchstone of successful operation in today's electric power industry is the coordination of operating facilities to achieve the full economies of scale made possible by advancing technolo-

gy." (p. 3) This, it asserted, could be achieved in several ways. Though it said the merger was but one of several ways of realizing the advantages of coordination, it rejected without recognizing the proper legal impact of other controlling issues and the alternative methods of coordination which Congress and Chairman White himself said should be utilized.

This Court said in *FTC* v. *Procter & Gamble Co.*, 18 L. ed 2d 303, 311 said, "Possible economies cannot be used as a defense to illegality."

In fact, the FPC itself declared coordination of Central's electric facilities without the merger would have been possible had Central moved more rapidly to such end (FPC 29).

III. THE DENIAL OF THE MOTION TO REMAND WAS ERROR.

It is unnecessary to repeat the summary of Petitioner's constructive Motion to Remand. (*supra* p. 5) It set up adequate grounds under 16 USC 825 l(b) in that it included substantial facts on the most material factor in the case. Such evidence was shown not to have been reasonably available to Petitioner earlier. It was the primary responsibility of the FPC and Edison to have produced the economic and statistical material bearing upon the relative efficiency of Edison and other giant systems compared to Central and the smaller electric companies of the nation. The fact FPC in June, 1968 itself undertook such a study, in part, demonstrates the essential need for such factual material in this record before a proper conclusion could be reached as to whether the merger was consistent with the public interest. It then recognized Petitioners had been correct.

There is ample authority among the decisions of this Court to support Petitioner's contentions, *Udall* v. *FPC*, 387 US 428, 437-451; *Scenic Hudson Preservation Conf.* v. *FPC*, 354 F. 2d 608, 624, 625 (CA 2) (1965); *Michigan Cons. Gas Co.* v. *FPC*, 283 F. 2d 204, 226 (CA Dt. of Col. 1960). In fact this Court has directed a remand even where new significant facts arose any time prior to the entry of the decision in the lower court. *Burlington Truck Lines* v. *U. S.*, 371 U.S. 156, 171. The issue of air pollution comes within this category. (Motion to Remand p. 12)

CONCLUSION

Petitioners have clearly demonstrated a showing justifying its allowance. Adequate discussion of the highly critical issues within the special province of this Court will then only be possible by all the parties.

Respectfully submitted,

UTILITY USERS LEAGUE and
NICHOLAS L. BARNES
Petitioners

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APPENDIX

APPENDIX

STATUTES INVOLVED

FEDERAL POWER ACT

Sec. 203 of the Federal Power Act, 16 U.S.C. 824b

(a) No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility without first having secured an order of the Commission authorizing it to do so. Upon application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable. After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same.

(b) The Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate.

Public Utility Holding Company Act —
Section 11, 15 USC Sec. 79k

Sec. 79k. Simplification of holding company systems— Examination by Commission with view to simplification.

. . . (b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: Provided, however, That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that —

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

16 U.S.C.

Sec. 825(1) Rehearings; court review of orders

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order . . .

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business . . .

If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recomendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.



In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1967—APRIL SESSION, 1968

No. 16164

UTILITY USERS LEAGUE AND NICKOLAS L. BARNES, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent,*

COMMONWEALTH EDISON COMPANY, *Intervenor.*

On Petition to Review Orders of the Federal Power Commission.

April 5, 1968

Before HASTINGS, *Chief Judge,* and CASTLE and SWYGERT, *Circuit Judges.*

HASTINGS, *Chief Judge.* This is a petition for review of the Respondent Federal Power Commission's order of December 2, 1966 approving the merger of Central Illinois Electric and Gas Company (Central) into Respondent-Intervenor Commonwealth Edison Company (Edison). Petitioners are Utility Users League and Nicholas L. Barnes, an Edison customer. The Utility Users League, according to the allegations in its petition to intervene before the Commission, is "a not-for-profit association of utility users including customers of Commonwealth Edison Company." Edison and Central are public utilities incorporated and operating in Illinois.

Prior to merger Edison provided electric energy for a service area of 11,000 square miles having a population in excess of 7,000,000. It had 2,272,700 customers in its service area, which contained the City of Chicago and its suburbs. The net value of its plant on December 12, 1965 was $1,788,082,518, and its annual operating revenue was $589,315,479. Edison operated twelve steam generating stations having a net capability of 7,764,000 kilowatts.

Central furnished electricity, gas, and minor amounts of water and steam heat in five non-contiguous territories in Illinois. The largest of these territories was the Rockford division, which contained 78% of Central's 94,468 electric customers and 81% of its 87,227 gas customers. That territory was surrounded on three sides by Edison's service area. On December 31, 1965 Central's net utility plant was valued at $91,681,655 (of which $56,422,122 was allocated to electric plant and $33,761,799 was allocated to gas plant) and its annual operating revenue was $40,533,403 (of which $22,951,829 was electric revenue and $17,126,436 was gas revenue). Central's two generating stations had a capability of 239,500 kilowatts. In the five years ending with 1965, Central's electricity sales increased at a compound annual rate of 7.8 percent. Its estimated 1966 peak load was 210,000 kilowatts.

Edison and Central filed a joint application for approval of their plan of merger on March 2, 1966 pursuant to § 203(a) of the Public Power Act, 16 U.S.C.A. § 824b (a). Petitioners filed their petition to intervene on April 7, 1966. Their petition and that of the City of Rockford were granted on July 6, 1966. Hearings were held between July 11 and July 20, 1966. Petitioners did not appear at those hearings, but were permitted to submit written interrogatories. The Commission's order and opinion approving the merger were filed on December 2, 1966. On January 30, 1967, the Commission denied petitioners' petition for rehearing filed January 3, 1967.

In its opinion the Commission considered the reasonableness of the purchase price, the accounting treatment, the economic effect of the merger, its voluntariness and its effect on competition. The Commission concluded that the merger was consistent with the public interest, as

required by 16 U.S.C.A. § 824b(a). It retained jurisdiction for future decision on Edison's operation of Central's gas and non-contiguous electric properties.

In their petition for review petitioners challenge the Commission's order on several grounds. They contend that the Commission failed to give adequate consideration to the anti-competitive effects of the merger, that the applicants failed to make an adequate record, that the merger violates the Public Utility Holding Company Act § 11(b)(1), 15 U.S.C.A. § 79k, that the purchase price was excessive, and, generally, that the merger is not "consistent with the public interest." See, 16 U.S.C.A. § 824b(a).

We are without jurisdiction to entertain this petition unless petitioners are parties "aggrieved by an order issued by the Commission." 16 U.S.C.A. § 825l(b). Similar limitations on the right to obtain judicial review are contained in other federal regulatory statutes. See, *e.g.*, Natural Gas Act, 15 U.S.C.A. § 717r(b); Communications Act, 47 U.S.C.A. § 402(b)(6).

The term "aggrieved party" has long eluded precise definition, and, as the Supreme Court has noted, its meaning "is in any event more or less determined by the specific circumstances of individual situations." *Chapman* v. *Federal Power Commission,* 345 U.S. 153, 156 (1953). Clearly, a petitioner for review need not show injury to a personal economic interest. *Scenic Hudson Preservation Conference* v. *Federal Power Commission,* 2 Cir., 354 F. 2d 608, 615 (1965).

A party seeking judicial review cannot rest on the mere allegation that he is "aggrieved." He must make a preliminary showing of aggrievement. *Lynchburg Gas Company* v. *Federal Power Commission,* 3 Cir., 284 F. 2d 756 (1960); *Cincinnati Gas & Electric Co.* v. *Federal Power Commission,* D.C. Cir., 246 F. 2d 688 (1957); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 3 Cir., 219 F. 2d 729, cert. denied, 349 U.S. 945, reh. denied, 350 U.S. 868 (1955).

In determining petitioners' standing to seek review in this court we are not bound by the Commission's order granting petitioners leave to intervene in the pro-

ceeding before the Commission. Petitioners' standing is a jurisdictional question to be determined by this court. In any event, the Commission's order permitting intervention provided that "the admission of such petitioners shall not be construed as recognition by the Commission that they, or any of them, might be aggrieved because of any order or orders issued by the Commission in this proceeding."

Petitioners alleged before the Commission that some of them were customers of Edison. Consumers have been found to be "aggrieved persons," entitled to obtain judicial review. *City of Pittsburgh* v. *Federal Power Commission,* D.C. Cir., 237 F. 2d 741, 748-749 (1956); *Reade* v. *Ewing,* 2 Cir., 205 F. 2d 630, 631-632 (1953); *Associated Industries* v. *Ickes,* 2 Cir., 134 F. 2d 694, 705-713, vacated for mootness, 320 U.S. 707 (1943). In each of these cases, however, the petitioner made substantial factual allegations that the challenged agency decision was detrimental to him.

Petitioners here have made no showing that the merger approved by the Commission has a significant detrimental effect on them, either actually or potentially. They perceive several possible detrimental effects of the merger: a lessening of competition, the joint ownership of gas and electric properties by Edison, increased rates for former Central customers, increased rates for all customers to offset the allegedly excessive price paid for Central's stock and increased difficulty in demonstrating the need for rate reductions.

Petitioners have shown, in general terms, that the merger will increase Edison's economic power and contribute to economic concentration in the electrical energy industry. They have not shown how such growth and concentration will aggrieve them. In a market characterized by competition a merger or other acquisition necessarily injures the consumer if it substantially lessens competition. In the electric utility industry, where restraints on competition are not only tolerated, but encouraged, see 16 U.S.C.A. § 824a(a), and where rates are subject to federal or state regulation, 16 U.S.C.A. §§ 812, 824d, injury to the consumer cannot be inferred from a merger, but must be demonstrated.

Petitioners have not shown that competition will be lessened by the merger of Edison and Central. The Commission found that Edison and Central were not in direct competition. Their sales to ultimate consumers were within their respective exclusive franchised areas, and Central was not engaged in supplying wholesale electricity. There has been no showing that Central was a potential entrant into the wholesale market. Compare *United States* v. *El Paso Gas Co.*, 376 U.S. 651 (1964). Nor has there been a showing that the enlargement of Edison's economic power as a consequence of the merger may have an anti-competitive effect.

We do not say that the merger of Edison and Central has no adverse effect on competition. We merely hold that petitioners have not shown an anti-competitive injury affecting them.

Edison's ownership of both Central's electric properties and its gas properties may be injurious to energy consumers in the territory formerly served by Central. However petitioners, consumers in Edison's pre-merger territory, are not aggrieved by such joint ownership.

Petitioners have made a showing that the merger may result in higher rates for Central's electric customers. They refer to the Commission's statistical studies of typical electric bills, which show that Edison's typical Chicago and suburban residential bills were higher than Central's typical Rockford residential bill. However, there is no showing that petitioners are aggrieved by higher rates for former Central customers.

Petitioners allege that customers of the merged utilities will be required to pay rates high enough to pay dividends on the "excessive" amount of securities issued in exchange for Central's stock. The merger plan approved by the Commission provides for the automatic conversion of each share of Central common stock into a share of new Edison $1.425 convertible preferred stock, and for Central's redemption of its outstanding preferred stock. Each share of the new Edison stock is convertible at the shareholder's option into six-tenths of a share of Edison common stock and is redeemable at Edison's option after five years at a price of $42.00 per share. The plan pro-

vides that the transaction be accounted for under the "pooling of interest" method, whereby the assets and liabilities of the two utilities are combined in the accounts of the merged company.

Petitioners' argument ignores the controlling Illinois law. Under that law, electric rates established by the Illinois Commerce Commission are based on a fair return on the property used in the public service, *not* on a fair return on the capital invested. *Illinois Bell Telephone Co.* v. *Illinois Commerce Commission*, 414 Ill. 275, 287-288 (1953); *Peoples Gas Light and Coke Co.* v. *Slattery*, 373 Ill. 31, 48-50 (1940).

The Illinois Supreme Court, in *Illinois Bell Telephone Co.* v. *Illinois Commerce Commission, supra*, recognized that a rule basing rates on invested capital would encourage "watered stock":

> "A further criticism would be that the adoption of such a rule would inevitably lead to the sin of over-invested capital, or to a situation susceptible to 'watered stock.' It was for this very reason that the sound, common-sense, and business-judgment rule of a reasonable return on the fair value of the property was evolved in the history of rate making in this country." *Id.* at 288.

Even assuming the unreasonableness of the price paid for Central stock, it does not affect the rates paid by consumers. Under the plan of merger, Edison's rate base and Central's are combined, without change. Petitioners have not shown that Central's valuation of its assets was excessive. On the contrary, they argue that *even with a lower rate structure than Edison, Central's rate of return on its property was higher than Edison's.*

Petitioners' final allegation of aggrievement, that the merger makes more difficult the task of demonstrating the unreasonableness of rates, is insubstantial. The value of plant changes constantly as new plant is acquired and old plant is replaced, depreciated and retired. The addition of Central's electric properties to the Edison plant does not significantly contribute to the inherent complexities of plant evaluation. Nor does the addition



of Central's gas properties create a significant problem of value allocation.

In sum, petitioners have failed to make the requisite threshold showing of aggrievement. They have not made substantial factual allegations of injury to their interests. We recognize the liberalization of requirements for standing to challenge the orders of federal regulatory agencies. *Cf. Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 2 Cir., 354 F. 2d 608, 616 (1965). We hold that petitioners have not met those liberalized requirements.

Since we have found and held that petitioners lack standing to challenge the order of the Commission approving the merger in question, this could be dispositive of the petition for review.

However, assuming arguendo, that petitioners do have standing, after a careful examination of the record, the Commission's decision and order, the briefs and oral argument, we reach the following conclusions.

It is clearly established that in determining the merger was consistent with the public interest, the Commission gave appropriate consideration to the policies of the antitrust laws. The Commission properly recognized that the standards of the Holding Company Act, though not directly applicable, were pertinent and retained jurisdiction of any divestiture issue for later determination. The Commission accounting treatment for the merger reasonably protected the public against any possible financial abuses from the merger.

Petitioners did not appear at the hearings and, with indulgence of the Commission, submitted written interrogatories and filed objections. We must conclude that the petition for review lacks substantial support and is wholly without merit. We do not deem it necessary to further state our views in this respect.

In short, the Commission decided this case on a comprehensive record, its findings were reasonable and consistent with the application of correct legal criteria, the public interest has been faithfully protected and the order should be affirmed.

We have carefully considered the motion of petitioners for remand for further hearings and a stay order. Such motion is denied.

For the foregoing reasons, the petition for review is denied and the Commission's orders approving the merger and denying rehearing are in all respects affirmed.

PETITION FOR REVIEW DENIED

ORDERS AFFIRMED.

No. 16164.

SWYGERT, *Circuit Judge*, concurring.

I am convinced that we are reaching the right result in this case by affirming the order of the Federal Power Commission approving the merger of Central Illinois Electric and Gas Company into Commonwealth Edison Company. I question, however, the majority's holding that the petitioners lack standing in this court to challenge the order of the Commission. Simply because the petitioners' claims of aggrievement are found, upon analysis, to be insufficient to set aside the merger does not, in my opinion, foreclose their standing to challenge the Commission's order. The question of their standing ought not to be merged with the question of the merit or lack of merit of their claims.

Regardless of any specific claims of aggrievement alleged by the petitioners, I believe that as consumers of Edison they have standing to pursue their petition for review. They were allowed to intervene in the proceeding before the Commission, and they participated in the hearings to a limited extent. In allowing intervention, the Commission indicated that such allowance was not to be construed as a "recognition" that the petitioners might be "aggrieved" by any order or orders subsequently issued by the Commission.[1] On the other hand, the Commission in this court makes no mention of the issue of petitioners' standing. (Only Commonwealth

[1] 16 U.S.C. § 825g(a) recognizes the Commission's power to "admit as a party [in any proceeding before the Commission] . . . any representative of interested consumers or security holders, . . ."

Edison raises this issue.[2]) I recognize that these facts are not determinative of the question of standing. For the right or allowance of intervention by a party in an administrative proceeding is not necessarily tantamount to a right of that party to judicial review as one who is "aggrieved" by the agency action.[3] But these circumstances are not without significance; indeed, they lend strength to the stature of petitioners as "parties aggrieved" by the Commission's order.

The landmark case, *FCC* v. *Sanders Bros. Radio Station,* 309 U.S. 470 (1940), initiated a trend which has most recently found expression in *Scenic Hudson Preservation Conference* v. *FPC,* 354 F.2d 608 (2d Cir. 1965), to broaden the class of parties that have standing to challenge agency action in court.[4] I respectfully submit that the majority in the instant case has veered sharply from that trend. Here, representatives of neither local governing bodies nor other affected groups attempted to obtain a review of the Commission's approval of the merger. In these circumstances, I believe that private parties, such as these petitioners who are consumers of one of the merged companies, ought to have standing to protect the public interest as "private Attorney Generals." *Cf. Associated Indus., Inc.* v. *Ickes,* 134 F.2d 694, 704 (2d Cir.), *vacated as moot,* 320 U.S. 707 (1943). Other-

[2] After the Commission's order approving the merger was entered, the petitioners (intervenors) filed a petition for rehearing with the Commission. Under 16 U.S.C. § 825l(a), the right to petition the Commission for a rehearing is limited to, "Any person, . . aggrieved by an order issued by the Commission. . . ." Thus the same statutory standard governs the right both to petition the Commission for a rehearing and to petition an appellate court to review Commission action. Although the Commission denied the petition for rehearing, it in no way intimated that the petitioners (intervenors) failed to satisfy the test of aggrievement necessary to seek a rehearing. Likewise, Edison did not question the petitioners' (intervenors') right to file the rehearing petition. The Commission's action in this regard dilutes the effect of its disclaimer that the petitioners (intervenors) would not be viewed to be aggrieved merely because they were allowed to intervene. Moreover, I have difficulty reconciling Edison's apparent silence at the time the petitioners (intervenors) sought a rehearing with its attack on their standing in this court.

[3] *Cf.* Jaffe, *Standing to Secure Judicial Review: Private Actions,* 75 HARV. L. REV. 255, 275 n. 67 (1961); Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators,* 81 HARV. L. REV. 721, 753 n. 139 (1968).

[4] *See* Jaffe, *supra* note 3.

wise, agency action of significant import might improvidently be foreclosed from the judicial oversight necessary to insure that the proper statutory safeguards and procedures have been followed. Consequently, I would hold that the petitioners have standing as "parties aggrieved," under 16 U.S.C. § 825*l*(b) to challenge the Commissioner's order in this court.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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No. 491

In the Supreme Court of the United States

OCTOBER TERM, 1968

UTILITY USERS LEAGUE AND NICHOLAS J. BARNES,
PETITIONERS

v.

FEDERAL POWER COMMISSION ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App.) is reported at 394 F. 2d 16. The opinion of the Federal Power Commission (C.A. App. 1–33)[1] is reported at 36 FPC 927. The Commission's order denying petitioners' application for rehearing and motion for a stay (C.A. App. 41–42) is reported at 37 FPC 257.

JURISDICTION

The judgment of the court of appeals was entered April 5, 1968. Petitions for rehearing and for rehear-

[1] The Commission and intervenor Commonwealth Edison Company filed a joint appendix below (hereafter "J.A."), and petitioners filed a separate appendix (hereafter "C.A. App.").

ing *en banc* were denied, respectively, on May 21 and May 28, 1968. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari until September 10, 1968, and the petition was filed September 9, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, as amended, 16 U.S.C. 825*l*(b).

QUESTION PRESENTED

Whether the order of the Federal Power Commission authorizing the merger of Central Illinois Electric and Gas Company into Commonwealth Edison Company, as "consistent with the public interest" under Section 203 of the Federal Power Act, was supported by substantial evidence.

STATUTE INVOLVED

Section 203 of the Federal Power Act, 16 U.S.C. 824b, provides:

> SEC. 203. (a) No public utility shall sell, lease or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. Upon application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which

the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable. After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same.

(b) The Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate.

STATEMENT

On March 2, 1966, Commonwealth Edison Company (Commonwealth) and Central Illinois Electric and Gas Company (Central) filed an application with the Commission seeking authority to merge Central into Commonwealth in accordance with Section 203 of the Federal Power Act, 16 U.S.C. 824b. After a hearing in which special provision was made for petitioners to participate at minimum expense, the Commission found that the merger was "consistent with the public interest" as required by Section 203, and authorized the merger.[2] The merger has been consummated.

[2] The merger was also approved by the Illinois Commerce Commission on April 27, 1966 (C.A. App. 11; 36 FPC at 929).

Background of the merger.—Commonwealth is a vertically integrated utility that supplies electric power at wholesale and, through its distribution system, at retail. Prior to the merger, it operated in Chicago and the rest of the northern third of Illinois, except for the area served by Central's Rockford Division. It was (and remains) the third largest of 211 major privately-owned utilities (FPC Classes A & B)[3] in the United States (C.A. App. 23; 36 FPC at 941). Commonwealth has had extensive interconnections with unaffiliated electric systems since the 1920's (J.A. 45–46; C.A. App. 9; 36 FPC at 933). In recent years Commonwealth has been able to build and plan for large-size generating units of 600,000 kw or larger. Commonwealth showed that a 600,000 kw unit costs 27 percent less per kw than a 100,000 kw unit (J.A. 39–42; C.A. App. 9–10; 36 FPC at 933–934).

Central, prior to the merger, was a considerably smaller combination utility system serving at retail 94,468 electric and 87,227 gas customers in several widely scattered areas in Illinois (C.A. App. 8; 36 FPC at 933).[4] About 78 percent of Central's electric

[3] Class A electric utilities are those which have annual electric revenues of $2,500,000 or more. Class B electric utilities have electric revenues between $1,000,000 and $2,500,000 as defined in the Commission's Uniform System of Accounts for Public Utilities and Licensees. (18 C.F.R. 101.)

[4] The scattered nature of the Central system (and of other Illinois utilities) was the product of the simplification of the old Consolidated Electric and Gas holding company system, approved in 1944 by the S.E.C. in *Consolidated Electric and Gas Co., et al.*, 15 SEC 386. Central had held Consolidated's Illinois properties and was allowed to retain them as an independent company.

customers and 81 percent of its gas customers were in the Rockford area, surrounded on three sides by Commonwealth's service area. In addition, it operated electric distribution properties in three isolated pockets in central Illinois, and another tiny pocket in southeastern Illinois. (*Ibid.*)

The major reason for Central's interest in merger with Commonwealth was its anticipated need for an increased power supply. Central estimated that its total system demand for electric power in 1971 would be 300,000 kw, an increase of 49.3 percent over 1965 (C.A. App. 12; 36 FPC at 935). Central considered several possible programs for satisfying this need. Following unsuccessful attempts to join with neighboring systems (other than Commonwealth) in the construction of jointly owned units, Central's engineering consultant made a study suggesting two other approaches (J.A. 9–28; C.A. App. 13–14; 36 FPC at 935–936). One of these approaches involved the construction of independent facilities by Central and the other the purchase of power from Commonwealth at a rate based on Commonwealth's average costs (a rate viewed as reasonable by the Commission) (C.A. App. 13; 36 FPC at 936).

It turned out, however, that still a third approach —merger with Commonwealth—would provide the most economical source of power for Central's area. Although the program of self-generation by Central would have been more than $3,000,000 cheaper than purchase of electricity from Commonwealth over a 10-year period (*ibid.*), merger would give a source of power estimated to be $13,000,000 cheaper than the self-

generation program over the same period (C.A. App. 13; 36 FPC at 935).[5]

The Commission proceedings.—There were only two intervenors before the Commission: petitioners in opposition to the merger, and the City of Rockford, Illinois, in spport of it.[6] On June 3, 1966 (C.A. App. 34–35; 35 FPC 877), the Commission specified that the parties should address themselves in particular to the comparative advantages and disadvantages of merged operations as contrasted with continued nonaffiliation supplemented by greater electrical coordination. The hearings spanned several days and covered the questions specified in the Commission's order as well as other matters raised by the Commission's

[5] One of Commonwealth's witnesses explained the reason for the difference between the post merger results and Plan I (additional purchases from Commonwealth) (J.A. 64): "This approach reflects the economic effect of the merger on the two companies combined rather than the individual effects on each company. Costs to Central in the without-merger case would actually be higher than assumed in the base case, since that case assumes that the capacity and energy required to supplement Central's own generation would be available at Edison's incremental cost; Central would [absent merger] obviously have to pay a higher price for such capacity and energy."

[6] Rockford did not participate beyond a prehearing conference. It had apparently been concerned over the possible loss of corporate tax revenues theretofore paid by Central which would follow a shift of corporate headquarters from Rockford to Chicago. But it announced that it had reached a settlement and thereafter took no further part in the proceedings (R. 57–61), and favored the merger since it eliminated any need for Central to build a new generating plant near the city, where the bulk of Central's customers were concentrated (C.A. App. 13; 36 FPC at 935).

staff as a result of its field investigation into the companies' offices and facilities and adjacent bulk power systems. The staff introduced a number of exhibits and conducted extensive cross-examination; in addition, since petitioners' counsel were not able to be present, they were permitted to cross-examine by written interrogatories (J.A. 95–151). On August 19, 1966, the Commission granted applicants' unopposed request for waiver of an intermediate decision by the examiner (36 FPC at 482).

The Commission decision.—On December 2, 1966, the Commission, in a comprehensive opinion (C.A. App. 1–33; 36 FPC 927–946) reviewing both legal and policy standards applicable to utility mergers, approved the merger, but retained jurisdiction to require Commonwealth to demonstrate within three years why it should not be compelled to divest itself of control over Central's isolated electric properties and its gas properties (C.A. App. 25–27; 36 FPC 942–943).

The Commission viewed the basic criterion for measuring whether a particular merger would be "consistent with the public interest" [1] to be whether it would be compatible with the Federal Power Act's goal of "assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with * * * the proper utilization and conservation of natural resources * * *" [2] (C.A. App. 5; 36 FPC at 931). The Commission noted C.A. App. 3; 36 FPC 930):

[1] Section 203(a), 16 U.S.C. 824b(a).

[2] Section 202(a), 16 U.S.C. 824a(a).

> The touchstone of successful operation in today's electric power industry is the coordination of operating facilities to achieve the full economies of scale made possible by advancing technology. There are several ways in which the advantages of coordination may be realized, merger being but one of them. * * *

The Commission expressly recognized that the "public interest" standard also requires evaluation of the proposed merger's consistency with the entire Public Utility Act of 1935 consisting of both the Federal Power Act (16 U.S.C. 791a–825r) and the Public Utility Holding Company Act (15 U.S.C. 79 *et seq.*) (C.A. App. 5–6; 36 FPC at 931–932).

In making its overall assessment, the Commission enumerated six separate factors of special significance: (1) the economic effect of the merger on operating costs and rates; (2) reasonableness of the purchase price; (3) anticipated accounting treatment; (4) voluntariness of the participation of the acquired utility; (5) impact on existing and potential competition; and (6) consistency with effective federal and state regulation over operations and rates (C.A. App. 7; 36 FPC at 932). The proposed merger was found to comport with the public interest, as gauged by each of these criteria, as follows:

(1) While relatively small systems may in some situations be able to share fully in the economies of scale simply by coordination with other systems, here a merger would achieve substantial bulk power economies ($13 million) beyond those possible for Central as a separate entity even with maximum feasible coor-

dination (C.A. App. 4; 36 FPC at 930–931). Merger would further permit annual savings of about $2,400,000 through payroll and administrative cost reductions and through replacement of Central's preferred stock with debt capitalization. The immediate post-merger period would bring a rate reduction—already approved by the Illinois Commission—aggregating $270,000 annually for Central's customers (C.A. App. 17–19); 36 FPC at 937–938). The Commission also found that further reductions in the future appeared likely by reason of the cost savings resulting from the merger (J.A. 85; C.A. App. 20–21; 36 FPC at 938–940).

(2) Although the purchase price for Central's shares was set at $24 million over their market value, the figure agreed upon was the fair result of arms-length bargaining, and reflected a reasonable adjustment for long-term growth and economies of scale (C.A. App. 16; 36 FPC at 937).

(3) The proposed merger involved an exchange of stock and the capitalization of the resulting entity would not exceed the aggregate capitalization of the two applicants. Since the amount of the payment above Central's book value would be charged against Commonwealth's stock and surplus accounts, there would be no effect upon the ultimate consumers of either utility. This treatment was found to be in accordance with sound accounting principles and with the requirements of the Commission's Uniform System of Accounts (*ibid.*).

(4) While Commonwealth had the power as the dominant utility in northern Illinois to inhibit Cen-

tral's efforts to secure meaningful interconnection, Commonwealth had not in fact retarded Central's efforts to achieve savings through coordination with its neighbors and had not in any way coerced Central into the merger (C.A. App. 21–22; 36 FPC at 940).

(5) Nor was any adverse effect on the competitive situation found. Since both Commonwealth and Central sold electricity to retail consumers only within their own franchised areas, and since Central had no significant wholesale sales or capacity, they were not in direct competition. The Commission further found that the merger of these two companies would not (a) result in any significantly increased concentration of economic power; (b) eliminate potential competition either directly or in attraction of new industries to their respective service areas; or (c) have an adverse effect on competing energy sources (C.A. App. 22–23; 36 FPC at 940-941).

(6) Finally, the integration of facilities would not lessen the ability of the Illinois Commerce Commission to continue to regulate effectively the rates to be charged by Commonwealth to the various customers of the combined systems (C.A. App. 25; 36 FPC at 942).

In appraising the scope of the merger, the Commission recognized that Commonwealth had been solely an electric utility (which had previously spun off its gas properties) and was limited to a physically integrated service area, while Central had some isolated electric properties as well as major gas properties. Although there had been no demonstration that it would be consistent with the public interest for the

merged company to retain these properties permanently, the Commission concluded that the final determination of the propriety of Commonwealth's continued operation of these facilities need not be a condition precedent to the approval of the merger. Indeed, the Commission found that the merger would not have been feasible if it had not initially included the transfer of the gas and non-contiguous electric facilities (C.A. App. 27; 36 FPC at 943).

Accordingly, as a condition to approving the merger, the Commission expressly retained jurisdiction to make future determinations with respect to the gas and isolated electric properties, and directed the merged company to show, not later than December 1, 1969, either why it should be allowed to continue to operate such properties, or what its plans were for disposition of them.* (C.A. App. 25–27, 31; 36 FPC at 942–943, 945).

Further proceedings.—On January 3, 1967, petitioners sought rehearing and a stay of the merger (R. 1943–1956). The Commission denied these requests on January 30, 1967 (C.A. App. 41–42; 37 FPC 257–258).

On review, the court of appeals held alternatively (1) that petitioners were not aggrieved within the meaning of Section 313(b) of the Federal Power Act,

*On November 24, 1967, Commonwealth reported that it had approached twelve electric and gas companies about a possible exchange of the gas and non-contiguous electric properties or some other disposition thereof, and that discussions with interested parties were in progress.

16 U.S.C. 825*l*(b) (Pet. App. 3–7),[10] and (2) that, in any event, the Commission's findings were adequately supported by the record and consistent with the applicable legal criteria. Concluding that the public interest had been "faithfully protected," the court affirmed the Commission's order (Pet. App. 7–8). Petitioners' motion for a remand to adduce additional evidence was denied (Pet. App. 8).

ARGUMENT

In fulfilling its responsibility under Section 203(a) of the Federal Power Act to determine whether proposed consolidations are "consistent with the public interest", the Federal Power Commission has evolved several pertinent criteria. Applying these criteria, the Commission found that the merger of Central into Commonwealth would result in substantial economies in supplying bulk power needed to meet load growth in Central's area and would facilitate rate reductions. Nothing in the policies of the Federal Power Act, the antitrust laws, or the Public Utility Holding Company Act was found to outweigh the advantages flowing from merger. The Commission's conclusions were rationally based and buttressed by findings amply supported by the record.

As the court of appeals recognized, the primary responsibility for measuring whether a proposed merger in a regulated industry is compatible with the

[10] The Commission did not below, and does not now, urge this ground. Indeed, since the court did in fact reach and pass upon the merits, the standing question sought to be raised (Pet. 2, 5) is academic.

public interest rests on the appropriate administrative agency. Having found that the Commission acted in accordance with proper legal standards and on the basis of substantiated findings, the court below properly affirmed the Commission's decision. See *Penn-Central Merger Cases*, 389 U.S. 486, 498–499.

Except for the standing point—which need not be considered here because the court of appeals also reviewed the case on the merits—the multifarious questions formulated in the petition (Pet. 2–6) are reducible to the final question framed: "Was the [Commission's] order contrary to the evidence?" Such questions as are raised in the petition as to the substantiality of evidence and the relative weight to be given to the various factual elements of an administrative proceeding do not present issues appropriate for plenary attention by this Court. Beyond these objections, the petition raises no issue of public importance, and points to no relevant conflict of decisions. Hence, further review is not warranted.

1. We discuss only briefly the arguments petitioners have advanced to support their request for review. First, as the court below recognized (Pet. App. 6), petitioners are doubly in error in complaining (Pet. 13–16) that the consideration given for Central stock was excessive. The price paid fairly reflects the book value of Central's plant taken together with its sales growth potential and anticipated economies of scale. Moreover, the payment of the purchase price in stock having a market value higher than the depreciated original cost of the Central properties could in no way burden the consumers of either system. The

cost of Central's assets on Commonwealth's books is identical with their premerger cost on Central books; adjustments have been made only in Commonwealth's stock and capital surplus accounts and the total capitalization of the merged company will not exceed the aggregate capitalization of Central and Commonwealth (C.A. App. 16; 36 FPC at 937).

2. The court below properly denied petitioners' motion to remand to permit them to adduce additional evidence. Petitioners chose to participate in the proceedings only to the extent of submitting interrogatories by way of cross-examination. But this is no reason why they could not have offered, during the hearings, evidence relating to the very matters referred to in the motion. In any event, as the Commission's opinion reveals, the petition to remand (see Pet. 5) does little more than repeat claims advanced to the Commission at various stages of the proceedings. These claims were considered by the Commission on the basis of substantial evidence developed by the applicants and the staff (after its field investigation), none of which is here challenged.[11]

[11] The only specific data included in the motion were tables intended to show that the retail rates and average revenue of large utilities, including Commonwealth, were frequently higher than those of smaller utilities. But the Commission did consider at length the relative rates of both Commonwealth and Central and expressly took into account that Commonwealth's rates in some categories were higher than those of Central, though overall there was little difference (C.A. App. 19–21; 36 FPC at 938–940); petitioners do not challenge the bulk power savings found to exist here.

Petitioners' assertion that the merger would result in in-

3. Insofar as petitioners seek to suggest (Pet. 16–19) that the Commission failed to take proper account of antitrust laws and policies, their contentions are baseless. Contrary to any such claim the Commission was acutely aware that the policies of the antitrust laws and the Public Utility Holding Company Act constitute an important ingredient of the "public interest."[12] Assessment of the proper impact of these principles on electric utilities calls for the exercise of expert judgment by the agency entrusted by Congress with the comprehensive task of regulating this industry. In so doing, that agency must also give effect

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creased air pollution in Chicago was made for the first time in petitioners' brief to the court below and hence its claim that the Commission failed to take this into consideration is not open here. See Section 313(b) of the Power Act, 16 U.S.C. 825*l* (b). In any event, the claim that the merger will increase coal-fired generation in Chicago is without substance. Commonwealth's construction plans (which, we point out, are not significantly affected by the merger) included no fossil fuel plants in or near Chicago. Two 600 mw units were under construction or on order and two 800 mw nuclear units were planned for later construction (C.A. App. 9–10; 36 FPC at 933–934). The 600 mw units are mine-mouth coal-fueled facilities located 175 miles southwest of Chicago and the energy will be carried to Chicago over 345 kv lines (J.A. 39–40). (Commonwealth is also planning another coal-fueled plant as a possible alternative to a nuclear unit, but this, too, will be remote from Chicago, at a site in southern Illinois. See *The Wall Street Journal* of September 19, 1968, p. 8).

[12] Cf. *California* v. *Federal Power Commission*, 369 U.S. 482, 484–485; *Atlantic Seaboard Corp.* v. *Federal Power Commission* (C.A. D.C. No. 21409, September 27, 1968) (slip op. p. 7 n. 10); see, also, *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 243–246; *Penn-Central Merger Cases*, *supra*, 389 U.S. at 498–502; *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154, 156; *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79.

to the policies of the regulatory statute it administers. Thus, in defining the policy of the Federal Power Act to assure abundant electric energy with the lowest possible rates to consumers, Congress has expressly recognized that an appropriate method for achieving economies of scale in bulk power supply is to allow, encourage, and regulate coordination of power supply facilities.[18] See *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 193 F. 2d 230, 234–235 (C.A.D.C.), affirmed, 343 U.S. 414. It was in this context that the Commission emphasized that whether a merger is the most appropriate form of coordination of systems turns on the peculiar facts of each specific situation and will be closely scrutinized (C.A. App. 3–5; 36 FPC at 930–931).

In making this inquiry in this case, the Commission acknowledged that economies of scale may be achieved by coordination between otherwise independent power systems and not only by corporate integration. The record here showed, however, that the coordination reasonably available to Central as a separate company would fall short by $13 million (over a 10-year period) of achieving the economies of scale that will result from the merger. See, pp. 5-6, 8-9, *supra*. Correspondingly, the Commission concluded that the economies in supplying bulk power resulting from the merger would make it possible for the Illinois Commerce Commission to effect significantly greater rate

[18] Section 202(a) of the Act, 16 U.S.C. 824a(a), directs the Commission to "promote and encourage such interconnection and coordination" of facilities for the generation, transmission, and sale of electric energy.

reductions for Central's customers than if Central remained independent (C.A. App. 21; 36 FPC at 940).

4. In addition, the Commission accurately found that the merger would have no substantial anti-competitive consequences (C.A. App. 22–24; 36 FPC at 940–942). The two companies were not in competition in any real sense: Central had no wholesale sales except for some limited interchanges with Commonwealth; and the franchised retail service areas of the two companies were distinct in accordance with state law. Furthermore, since Commonwealth's industrial rates were lower than Central's, there was no serious competition in attracting new industrial customers to their respective service areas. Indeed, the City of Rockford's ability to attract industry is probably enhanced by the economies that will result from the merger. Moreover, in light of the existing degree of concentration and the sizes of the two companies, the Commission reasonably concluded that Commonwealth's economic power would not be significantly increased by the merger, either in relative or absolute terms (C.A. App. 22–24; 36 FPC at 940–942).

The record also supports the Commission's finding (C.A. App. 24, 31; 36 FPC at 941–942, 945) that the merger would have no adverse effect on competition with other energy sources. Central, to be sure, owned gas distribution properties which were included in the merger, and Commonwealth, which previously controlled no gas properties of its own, intended to continue Central's practice of using excess gas as boiler fuel in its steam generators. As a practical

matter, the merger with its attendant economic benefits would not have been feasible if these properties were not initially included in the transfer. It was within the Commission's sound discretion to conclude that any divestiture of the acquired gas and noncontiguous electric properties should be delayed pending further study of the alternatives. Compare *Denver & Rio Grande Western Railroad Co.* v. *United States*, 387 U.S. 485.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

UTILITY USERS LEAGUE and
NICHOLAS L. BARNES,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent,

COMMONWEALTH EDISON COMPANY,

Intervenor-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF INTERVENOR-RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Petitioners, Utility Users League (an alleged "association of utility users including customers of Commonwealth Edison Company")[1] and Nicholas L. Barnes (an Edison customer), intervened before the Federal Power Commis-

[1] Petition for Leave to Intervene. Rec. 1551. References to "Rec. . . . " are to the Record before the Commission as certified to the Court of Appeals.

sion[2] (the "Commission") in opposition to the then proposed merger of Central Illinois Electric and Gas Company into Commonwealth Edison Company (the "Merger"). After full hearing, the Commission, finding that the Merger would result in substantial economies, have no adverse effect upon competition and be properly reflected on the surviving corporation's accounts, issued its order approving the transaction. No consequence, adverse to the interests of either Petitioners or anyone else, was found.

The Court of Appeals affirmed, concluding not only that the absence of adverse effect upon Petitioners' interests left them without standing, but that the Commission had in fact fulfilled its statutory responsibilities in its analysis and authorization of the Merger.

Thus, as the Court of Appeals' decision was based upon the alternative grounds of Petitioners' lack of standing and the propriety of the Commission's action, the question presented is whether either of these two conclusions was correct.

STATEMENT OF THE CASE

The petition for certiorari seeks review by this Court of the decision of the Court of Appeals for the Seventh Circuit (*Utility Users League* v. *Federal Power Commission*, 394 F.2d 16 (1968)) affirming the Commission's order approving the merger of Commonwealth Edison Company ("Edison") and Central Illinois Electric and Gas Company ("Central"). *Commonwealth Edison Company and Central Illinois Electric and Gas Company*, 36 FPC 927 (1966).

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[2] Petitioners did not appear at the hearings, their participation in the proceedings consisting solely of the filing of briefs, various motions and a series of "Interrogatories" (the last being set forth in the Joint Appendix of the Federal Power Commission and Commonwealth Edison Company at pages 95-151).

The merging companies were both public utilities incorporated under the laws of the State of Illinois, operating within their respective franchised service areas in that state. 36 FPC 927, 932-33[3]. Edison, by far the larger of the two, was an electric utility serving a population of some 7,100,000 in its service area of approximately 11,000 square miles. Its net plant as of December 12, 1965 was $1,788,082,518. 36 FPC 927, 932. Central was engaged in supplying electric, gas and minor amounts of water and steam heat service in various territories in the State. It served approximately 95,000 electric customers in five non-contiguous territories. The largest, from which Central derived 80% of its business, was the Rockford area, bordered on three sides by Edison's service area. Central's net plant, as of December 31, 1965, was $91,681,655, of which $56,422,122 was devoted to rendering electric service and $33,761,799 to rendering gas service. 36 FPC 927, 933.

On March 1, 1966, Edison and Central concluded an agreement of merger. The Merger was statutory in form, with each share of Central common stock being converted into one share of Edison $1.425 Convertible Preferred Stock. The Convertible Preferred Stock could be exchanged for 6/10ths of a share of Edison common and, at Edison's option, was callable after five years for a price of $42 per share. 36 FPC 927, 934. The transaction was accounted for under the "pooling of interest" concept of accounting. Thus, the assets and liabilities reflected in the various accounts of the merging companies were combined to form the accounts of the surviving corporation with no change in the basis of accountability. The convertible pre-

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[3] The references to 36 FPC . . . are to the findings of the Commission as contained in its order authorizing the Merger. *Commonwealth Edison Company and Central Illinois Electric and Gas Company*, 36 FPC 927 (1966).

ferred stock was recorded at its aggregate stated value, the difference between such stated value and Central's common equity being transferred from Edison's premium on common stock. There was, therefore, no acquisition adjustment resulting from the merger. 36 FPC 927, 937.

Pursuant to Section 203(a)[4] of the Federal Power Act, Edison and Central, on March 2, 1966, filed their joint application for Commission authorization of the Merger. On April 7, 1966, seven days after the last day set for filing protests or petitions for leave to intervene, a petition seeking intervention was filed on behalf of the Petitioners. Public hearings were set for July 11, and by an order dated July 6, 1966, Petitioners' request for intervention was allowed.

The evidence presented to the Commission demonstrated, and the Commission found, that the Merger would result in savings of $13,000,000 in bulk power generating and transmission costs during the first 10 years of combined operation. Additional savings attributable to such items as labor and administrative costs were shown to accrue to the merged system. 36 FPC 927, 938.

The integration of Central's generating system with Edison's served to greatly increase bulk power resources available to Central's customers, thus improving service reliability. 36 FPC 927, 935 and 938.

While the only immediate effect upon rates was a reduction of approximately $270,000 per annum to Central's Rockford area customers, more substantial benefits were to be expected, for the cost savings achieved by the Merger would result in rates lower than would otherwise have prevailed. 36 FPC 927, 937-38.

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[4] 16 U.S.C. § 824b(a) (1964). The Federal Power Act, 16 U.S.C. §§ 791a et seq. (1964), is referred to herein as the "Power Act."

Furthermore, the Merger produced a more rational alignment of Illinois service territories. The island which was Central's Rockford service area was eliminated with resultant improvement in service to the boundary areas. 36 FPC 927, 938. All of Central's electric service territory outside of the Rockford area was closer to Edison's generating facilities than Central's and portions of it would be traversed by the Edison transmission system. Thus, eventual physical integration of those service territories into the main power system was facilitated. 36 FPC 927, 943 n.21 and Rec. 971 and 973.

On the basis of the foregoing findings of benefit and the absence of adverse effects flowing from the transaction, the Commission, on December 2, 1966, authorized the Merger as consistent with the public interest, and the Merger was consummated on December 9, 1966. Jurisdiction over the question of Edison's continued operation of Central's gas distribution facilities and the electric service territories other than the Rockford area was retained by the Commission. 36 FPC 927, 945.

On petition for review, after full briefing and oral argument of the merits as well as Petitioners' standing to seek review, the Court of Appeals affirmed. The Court held not only that the absence of adverse effect upon the Petitioners' interests left them without standing, but that the Commission had properly fulfilled its statutory duties in its examination of the Merger.[5]

ARGUMENT

The questions framed by Petitioners are simply not present in this case. Their arguments with respect to their

[5] The court was unanimous in the conclusion that Commission authorization of the Merger was proper, but Judge Swygert, concurring, disagreed with the majority's holding that Petitioners lacked standing.

standing proceed as though the Court of Appeals decided questions not presented to it and are predicated upon a fundamental misunderstanding of the rate making process. Their remaining arguments are similarly academic for they rest upon assumptions contrary to uncontested Commission findings.[6]

Petitioners Lack Standing to Seek Review.

Section 313(b)[7] of the Power Act limits standing to challenge Commission action to those parties "aggrieved" by it. One's status as a party aggrieved is jurisdictional and must be demonstrated. *Lynchburg Gas Co.* v. *Federal Power Commission*, 284 F.2d 756 (3d Cir. 1960); *Cincinnati Gas & Electric Co.* v. *Federal Power Commission*, 246 F.2d 688 (D.C. Cir. 1957).

Despite Petitioners' allusions to the contrary, no one contends, and the Court did not rule, that a utility's customers, as such, are without standing to seek review of administrative action affecting the utility. Nor did it rule,

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[6] In addition to their attempts to raise questions as to the applicability of the policies of the Public Utility Holding Company Act of 1935 (15 U.S.C. §§ 79 et seq. (1964), referred to herein as the "Holding Company Act"), and the antitrust laws, to the Commission's responsibilities under the Power Act, discussed *infra*, Petitioners now seek to raise one question not presented by them to the Court of Appeals. At various points in their petition for certiorari they allude to the question whether Section 203a's "consistent with the public interest" standard requires a showing of positive public benefit beyond that required to outweigh any adverse consequences of a transaction. Suffice it to say that such a construction, which is at war with both the language and context of the section (*Pacific Power and Light Co.* v. *Federal Power Commission*, 111 F.2d 1014, 1016 (9th Cir. 1940)), would not advance Petitioners' case, for the Commission found positive public benefit and no public detriment.

[7] 16 U.S.C. § 8251(b) (1964).

as Petitioners suggest, that customers whose interests are adversely affected may not advance any ground, irrespective of its relationship to their interests, to overturn the administrative action. The Court merely ruled that where, as here, that action does not result in an adverse effect upon any of their interests they are not aggrieved thereby.

Petitioners claim to be aggrieved as Edison customers by the effect of the merger upon their rates. But, under the law of Illinois, pursuant to which those rates are fixed, the Merger can have no adverse effect upon Edison's rates. Rates are, of course, only based on the value of the capital devoted to the enterprise, and the Merger, involving no acquisition adjustment, could have no effect upon such value.[8] The Illinois Commerce Commission, which is charged with the sole responsibility for fixing rates paid by Illinois consumers, will only allow a rate sufficient to "produce a fair return upon the *property* used and employed in the public service." *Peoples Gas Light and Coke Co.* v. *Slattery*, 373 Ill. 31, 48, 25 N.E.2d 482, 492 (1940) (emphasis added). And that fair return is based only on the present fair value of such property, not what was issued in exchange therefor. *Illinois Bell Telephone Co.* v. *Illinois Commerce Commission*, 414 Ill. 275, 287-89, 111 N.E.2d 329, 336-37 (1953). Thus, even were Petitioners correct in their assertion that the value of the securities issued by Edison in connection with the Merger was "excessive"[9], that fact could have no adverse effect upon rate-payers.

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[8] As noted, the Merger was accounted for under the "pooling of interest" theory, with no write-up of assets. Thus, even Edison's own books would provide it with no argument for a rate increase as a result of the transaction.

[9] Petitioners do not dispute the Commission's finding that the purchase price, or conversion ratio, was arrived at by good faith, arm's length bargaining between Edison and Central and that the Merger could not have been accomplished at the book value of Central's assets or the market value of Central's stock. 36 F.P.C. 927, 937.

As the only serious[10] claim of adverse impact upon any of Petitioner's interests is without merit, the ruling that under the circumstances of this case they were not aggrieved by the Commission's authorization of the Merger was correct. But, in any event, it was only an alternative basis for affirmance of the Commission's order by the Court of Appeals. That Court did consider the merits of the order on the assumption that Petitioners had standing.

The Merger Presents No Question of the Relationship of the Policies of Either the Holding Company Act or The Antitrust Laws to the Power Act.

Petitioners seek to have this Court determine the proper resolution of any conflict between the policies of the Power Act and the policies of the Public Utility Holding Company Act and the antitrust laws. This case, however, does not require any such determination, for the facts show that there was no conflict to resolve.

A. Petitioners' allusions to the Merger's conflict with the Holding Company Act's policies against the operation of combined gas and electric systems and the operation of unintegrated properties (Sections 10 and 11, 15 U.S.C. §§ 79 j and k (1964)) overlook the fact that the merger did not create such a system. Prior to the Merger Central was a combination gas and electric utility operating non-contiguous property. Unlike the case where such a situation is brought about by an acquisition, the Merger merely substituted Edison for Central. *Cf. Western Light & Tele-*

[10] Petitioners persist in referring to an argument, first raised before the Court of Appeals, that the Merger will somehow contribute to air pollution in the City of Chicago. The basis of this contention has apparently escaped all who have been called upon to respond to it.

phone Co., 33 FPC 1147 (1965). In so doing, it promoted, rather than frustrated, the policies of the Holding Company Act. The non-contiguous properties are far closer to Edison's generating facilities than Central's, and at points will be traversed by Edison's transmission lines. Thus, eventual physical integration of those properties was rendered more likely by the Merger.

Moreover, the Commission retained jurisdiction over the question of whether the new system should continue to operate the gas facilities and non-contiguous electric facilities. Edison has been required to show, by not later than December 1, 1969, why it should continue to operate such properties, and render interim reports on the status of its studies for the integration or disposition of the properties on December 1, 1967 and December 1, 1968. 36 FPC 927, 945. Thus, in any event, review of the propriety of Edison's retention of these facilities would seem to be premature.

B. As is the case with their arguments predicated upon the policies of the Holding Company Act, Petitioners have chosen an improper vehicle to determine the relationship between the policies of the Power Act and the antitrust laws. This is not a case calling into question the scope of an agency's discretion to balance the anti-competitive impact of a transaction against the purposes of the regulatory scheme administered by it, for the Merger had no anti-competitive effects. As part of its determination of the Merger's consistency with the public interest the Commission considered its impact on competition. It found that the merger would not eliminate any meaningful competition for retail or wholesale customers, and would have no adverse effect upon competing energy sources. 36 FPC 927, 941. These findings, which can only lead to the con-

clusion that the Merger had no adverse effect upon competition, have never been challenged by Petitioners.

CONCLUSION

Petitioners' arguments present no substantial questions. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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PETITIONER'S

REPLY

MEMORANDUM

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OCT 21 1968
JOHN F. DAVIS, CLERK

No. 461

In the Supreme Court of the United States

OCTOBER TERM, 1968

UTILITY USERS LEAGUE and NICHOLAS L. BARNES,
Petitioners,

vs.

FEDERAL POWER COMMISSION,
Respondent,

COMMONWEALTH EDISON COMPANY,
Intervenor-Respondent.

On Petition to Review orders of the Federal Power Commission

PETITIONERS' REPLY MEMORANDUM

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In the
Supreme Court of the United States

OCTOBER TERM, 1968

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PETITIONERS' REPLY MEMORANDUM

I. THE ISSUES BEFORE THE COURT ARE BASIC ERRORS OF LAW PROVEN BY RELIANCE UPON KEY FACTS.

Contrary to the FPC brief, this case was not brought to this Court on the issue whether the merger "Order (was) contrary to the evidence". (p. 13) In material respects, it is true such errors do exist, but the Petition was predi-

cated upon a combination of serious errors of law committed by both the Court of Appeals and the FPC. Our claims were buttressed by reliance upon (undisputed) key facts normally an indispensable basis for review of a complex utility rate case or financial transaction. These facts demonstrate a departure from principles consistent with the public interest and do not convert our Petition into a mere quarrel over adequacy of evidence. Unlike Edison and the FPC we did not import a telescope for our facts are clear to the naked eye. Our discussion of the opposing briefs referred to supplementary facts overlooked by the FPC confirm our claim the merger is inconsistent with the public interest.

II. THE PURCHASE PRICE WAS EXCESSIVE.

A. The FPC Brief Disregards The 50% Increase In Dividends Paid By Edison to Central's Common Stockholders.

Of the six factors considered by the Commission, purchase price is surely of major importance. FPC's claim the purchase price was not excessive and would not burden either Central's or Edison's customers is in large part grounded upon the statement (p. 14):

> "and the total capitalization of the merged company will not exceed the aggregate capitalization of Central and Commonwealth."

But it and the FPC order (pp. 15, 16) overlooked the drastic increase in dividend rate and total payments to Central's common stockholders by Edison. Central paid 90¢ a share in 1965. The Edison rate was $1.425 on the Convertible Preference Stock issued by Edison share for share for such Central stock. Central's total common stock dividend payment in 1965 was $3,918,641.[1] Edison agreed

[1] Exhibit D (p. 3) Moody's Public Utility Manual, 1966, p. 83.

to pay $6,200,000, or an annual increase of $3,000,000 to Central's common stockholders Edison's customers contributes 95% of this sum. Surely Edison's customers and a Court upon review had a right to expect this Commission would take such evidence into account before concluding no real difference affecting consumer's interest between the old and new capitalization existed.

The claim by FPC the purchase price "could in no way burden the consumers of either system" (p. 13) is purely theoretical. The same is true of the suggestion that the price fairly reflects the book value of Central's plan, ($75,000,000) less. Edison's willingness to pay this enormous premium casts a shadow on its alleged pure motives. It reveals Edison's eagerness to acquire Central for almost any price and under any conditions, including the willingness to return to the gas operations condemned 15 years earlier by the management.

B. The FPC Brief Filed In The Recent Duke Power Case Supports Our Claim The Purchase Price Violated The Federal Power Act.

2. Our claim the merger conflicts with the Commission duties to protect the public interest finds substantial support in the principles urged by the FPC itself in *Duke Power Co.* v. *FPC*, No. 20,578 CA Dt of Col. June 28, 1968. Its argument was largely predicated upon the legislative history of Sec. 203. Our Petition (p. 7) did state none of the problems presented there were considered applicable here, but we intended our comments to be limited to the jurisdictional issues. After filing our Petition the FPC Brief came into our possession. Though we quote from it in some detail in the Appendix to this Brief the FPC then argued mergers under the Power Act were to bear (a) a proper relation to investment or original cost, (b)

to prevent unwarranted prices,[1] (c) accounting control under the Act was insufficient to safeguard the rate payer and (d) that the consumer was adversely affected by the difference between a high purchase price and actual investment in physical property.

It is strange the FPC thought the approximately $65,000 difference (in *Duke*) between original cost less depreciation, and the purchase price (30% of the net plant) impaired the merger provisions of the Power Act, but the $75,000,000 difference here did not, even though the price paid was 80% above Central's net plant. The decision of the Court of Appeals based essentially on jurisdictional grounds is not in conflict with such contentions.

III. THE ALLEGED SAVINGS ARE NOT ONLY UNREALISTIC BUT CENTRAL'S CUSTOMERS SUFFER BY THE MERGER.

Another factor claimed to support the merger is its economic effect on operating costs and rates (pp. 8, 9). It is said that not only will Central's power costs be reduced by $13,000,000 (in the 10 year period) but other costs largely payroll and administrative costs will permit other savings of about $2,400,000. This conclusion is at war with realities. *Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U.S. 151, 164. It ignores the fact that Central employees are paid a wage scale 15% below Edison's. It is inevitable that Central's wages will be increased. But more important is the fact that Exhibit II states the total operation expense of Central's electrict operations in 1965 was $8,752,358.

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[1] S. Rep. No. 621 74th Cong. 1st Sess. p. 50. It would have been useful, we think, to this Court, had the FPC borrowed from the *Duke Power brief* and included its review of the legislative history in the brief filed here.

The estimates of savings in Central's operating cost reach a total of about 40% are highly conjectural and speculative. They are not born out by the agreement to limit Centrals' customers to a single rate reduction of $270,000. Moreover, as the Motion To Remand (p. 9) discloses, Edison's overall operating expenses per customer are about 99% of Central's. Central charges lower electric rates than Edison and lower rates to a few industrial customers is not an offsetting factor.

The $13,000,000 is Central's expert estimate not an FPC study. It is open to question. FPC Statistics El. Uts. 1965 states Central's total production costs in 1965 were $4,251,000 (p. 404) (or 19% of revenues) and Edison's similar costs were $104,000,000 (p. 405) (or 18% of revenues). Subtracting $1,300,000 from Central's $4,251,000 would reduce Central's production costs to 13%, an unrealistic estimate.

IV. EFFECT ON REGULATION OF EDISON'S AND CENTRAL'S RATES.

The statement (p. 10) in the FPC brief that the integration of facilities would not lessen the ability of the Illinois Commission "to continue to regulate effectively the rates to be charged by Commonwealth" is contrary to fact. It erroneously assumes Edison's giant system is "regulated effectively". Edison's rates have been subject to public hearings on three occasions in the past 50 years. In the two rate increase cases between 1954 and 1958, Edison obtained 100% of the rate increases requested[1] and the voluntary reductions since then only offset the increases in part.

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[1] Re Commonwealth Edison Co., 24 PUR 3rd 209, re Comm. Ed. Co., ICC No. 41130 January 16, 1954.

Moreover, it is somewhat surprising for a Federal Agency which has repudiated fair value as a disaster to effective regulation to now advise this Court that Edison's rates are effectively regulated under fair value.

In *Colorado Interstate Gas Co.* v. *FPC,* 324 US 581, 604, this Court approved the Commission's rejection of "estimates of reproduction cost now less observed depreciation because they were (too) 'conjectural to have probative value' and adopted original cost as 'the best and *only reliable* evidence as to property values.'"

FPC's own calculations disclose that in 1965 Edison earned 8.56% on its net investment and Central 9.66%. Adjustments of these returns to the 6½% rate of return generally considered by the FPC to be reasonable in that year would have brought about rate reductions of about $4,000,000, in Central's case and over $25,000,000 in Edison's rates. (FPC Statistics Electric Companies 1965—pp. 651-653). The inability of utility users to have their rates determined on the basis of original cost, less depreciation, in itself contradicts the FPC statement that Edison's rates are subject to effective regulation.

V. THE FPC PROCEEDINGS AND MOTION TO REMAND.

FPC states we could have offered during the hearings evidence on "the very matters referred to in the Motion" (p. 14). Neither we, or any party, could be expected to do so for the FPC on July 6, 1966 (Rec. 1601) granted our April 5, 1966 Petition to Intervene (Rec. 1551-1562) and the hearings were held between July 11 and 20, 1966. Our request they be held in Chicago, also the location of Edison offices and witnesses, was denied.

Moerover, the FPC seems to disclaim its independent responsibility to develop an adequate record. It did not follow the usual practice in rate cases of presenting witnesses and offered few exhibits, devoted we think, primarily to power supply. It could file its 17 page Certificate of Record, and identify thereon its exhibits. We understand, that part of Edison's exhibits may have represented data desired by the FPC staff in the record. And, the FPC legal staff and Examiner did assist the League's participation though it did more than submit the extensive interrogatories, as claimed by the FPC Brief (p. 14, par. 2).

Both Edison (p. 8) (fn. 10) and the FPC (pgs. 14-15) criticized the Motion to Remand reference to air pollution (pgs. 12-13). The significance of this factor was not common knowledge until after the appeal was, though it probably was known to Edison. The FPC Brief stated the merger was favored by Rockford for it "eliminated any need for Central to build a new generating plant near the city" (p.6, fn. 6). We took the selfish view that since Edison's generation of steam energy in Chicago, and immediate area, was a major factor in Chicago's second rank in the Government's study of air pollution of metropolitan areas (p. 12), that any energy from other sources should contribute to the elimination of steam generation in Chicago. The merger requires that Rockford's interest be placed ahead of Chicago's, a questionable preference by Edison's management in view of its greater obligations to Chicago's customers.

VI. THE ANTI-COMPETITIVE FACTORS.

The absence of an adequate record on this issue is attributed in part to the fact that it was not listed among the issues to be covered in the June 3, 1966 FPC "Order

Providing for Hearing" (C.A. Rec. 34, 35), though it is one of the six factors referred to in the FPC brief (pp. 8, 17, 18) and order. (p. 7)

The FPC brief though dealing exclusively with the merits ignored those aspects of the Court of Appeals' decision concluding Petitioners had shown anti-competitive injury to Central's customers but such showing was of no consequence since Petitioner's lacked standing to raise issues affecting Central's customers (pp. 4, 5). This Court is nevertheless requested to accept the FPC's findings on this primary judicial issue, a strange departure from the customary position of the Department of Justice in anti-trust cases. (*U.S.* v. *First City Nat. Bk.*, 18 Law Ed2 151.)

The FPC brief concedes Edison's industrial rates were lower than Central's but asserts, "there was no serious competition in attracting new industrial customers to their respective service areas." (p. 17) By implication, at least, this lends support for Petitioner's Motion to Remand insofar as it contends Edison abused its economic power and discriminated against its residential customers, charged lower industrial rates in order to compete unfairly for industrial business (pp. 6, 10) against Central and other electric companies.

CONCLUSION

We have demonstrated serious errors of Law committed by the Court of Appeals and the FPC. The urgent need for this Court's consideration whether proper criteria consistent with federal laws control the elimination of the remaining small or medium size efficient electric operating companies is confirmed by current industry and govern-

mental discussion.[1] It is in this case that all proper parties can be heard—a giant representative of the industry, the governmental agencies and the also seldom separate voice of the man who pays the electric bills—the electric user and the important residential user as well.

Respectfully submitted,

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Petitioners

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[1] October 1968 issue of Public Power reporting the recent Senate Commerce Committee hearings on the nomination of Albert B. Brooke, Jr. for membership on the FPC stated:

"Asked whether he agreed with a prominent power company executive who suggested that the Nation's electric utilities be reduced to 12 to 15 large systems, Mr. Brooke said that 'looking at it objectively, you might say the fewer (systems) the better.' However, he also agreed in answer to another question that small systems may perform as valuable a service as large systems." (pp. 26, 27)

APPENDIX

QUOTATIONS FROM FPC's BRIEF IN DUKE POWER COMPANY, v. FPC, NO. 20578 CA Dt. of Col.

Referring to the report of the National Policy Committee on Public Utility Holding Companies transmitted to Congress by the President which said:

> "The commission should have power to prevent acquisitions at prices which do not bear a proper relation to the capital prudently invested in the underlying utility properties, or if the acquisition would tend to create monopoly or restraint of trade in the exercise of control of public-utility companies." (S.Rep. No. 621, 74th Cong., 1st Sess., p. 2) (P. 11)
>
> "C. Petitioner also argued before the Commission that through its authority over accounts the Commission has adequate means of discharging its regulatory responsibility without the use of Section 203. But this is merely to argue that the Commission is only empowered to lock the barn after the horse is stolen . . . (p. 18)."
>
> "For while it may be possible by accounting measures to prevent the retention in the purchaser's capital accounts of the excess over the seller's net investment, and while it may be possible, where an excessive price has been paid to prevent it from permanently increasing the rate base upon which rates must thereafter be fixed, the financial effect of a too-high purchase price on cost of money to the purchaser may be so substantial and stubborn, that in the long run, the ratepayer will have to bear the burden in the rate of return allowed. See the penetrating analysis by Chairman James M. Landis in Western Air Lines Inc. and United Air Lines, Inc., 8 CAB 298, 325-345 (dissenting). That is, undoubtedly, one of the reasons util-

ity rate regulatory powers are usually buttressed with powers to regulate property and security transactions. (pp. 19, 20)

"That the amounts involved in the present case are small in relation to the size of the acquiring company and hence may not noticeably affect its cost of money is not relevant to our question here, which is that of the proper interpretation of the Act to apply to all cases, including those in which the amounts involved may not be relatively small as here." (p. 20)

"Here again, petitioner has overlooked the Act's purposes already discussed, *i.e.*, prevention if inflation in the financial structure of a 'public utility' through acquisitions at excessive prices." (p. 21)